IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 290.

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

REPLY BRIEF FOR APPELLANTS.

EDWARD S. JOUETT.
For Appellants.

H. L. STONE,
W. A. COLSTON,
J. B. KEEBLE,
CLAUDE WALLER,
Of Counsel.

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This is a reply to the briefs filed by the United States and the Interstate Commerce Commission.

THE GOVERNMENT'S BRIEF.

The brief for the Government does not question any of the facts, nor controvert the correctness of appellants' contention that the question here involved is one of law arising from undisputed facts. Neither does it offer any response to the various arguments presented by appellants. It relies solely upon two propositions, stated at page 6 of its brief thus:

> "No extended argument of this case is proper, because this court has already, we submit, not only (*a*) settled the principles involved (*Pennsylvania Co. vs. United States*, 236 U. S., 351), but has also (*b*) applied those principles to the facts presented by this record (*Louisville & Nashville Railroad Company vs. United States*, 238 U. S., 1)."

(Except where otherwise specified, all italics are ours.)

The Pennsylvania Case.

Of its first suggestion, the principles in the Pennsylvania case, the Government, preceding a brief quotation from that case, says only this:

> "(*a*) In the former case, it is again announced with citation of numerous cases, that discrimination is a *question of fact* for the determination of the Commission (p. 361); that transportation similar to that involved in this case comes within section 3 of the Act to Regulate Commerce as amended (pp. 363-364); that to require such interchange is not a taking of property without due process of law (p. 369), and does not require the carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business (pp. 366, 369)"

Concerning the four propositions in this statement we reply:

(1) That discrimination is a question of fact for the determination of the Commission we admit, but we have asserted, and the Government does not deny, that where the facts are undisputed it is for the court to say whether the "finding was contrary to the indisputable character of the evidence," or whether the facts, *"as a matter of law,* support the order made," since "the legal effect of evidence is a *question of law.*" (Quotation, from Interstate Commerce Commission *vs.* L. & N. R. R. Co., 227 U. S., 88, 91, 92, set out more fully at pages 60, 61, of L. & N. brief.) This is the situation here. The facts are undisputed. We insist that the court misapplied the law to them.

(2) That the "transportation" here sought—namely, that one carrier shall switch cars for another—is similar to that involved in the Pennsylvania case we admit, but that proposition is not in issue. We do not deny that, under the doctrine announced in the Pennsylvania case, if we are *switching for each other,* we must switch for the Tennessee

Central. The Pennsylvania case involved the simple question of *discrimination in switching*. At New Castle, Pa., the Pennsylvania Company *switched competitive cars for* three of its competitors, but refused to switch for the fourth, the Rochester Company. The latter applied to the Interstate Commerce Commission for relief, claiming that this was discrimination. The Commission, solely on the ground of *discrimination in switching*, ordered the Pennsylvania Company to remove the discrimination—that is, switch for the fourth railroad or for none. This the court approved. This second statement of the Government, then, is likewise irrelevant, being wholly aside from the one question involved in our case as to whether appellants do or do not *switch for each other*, as that expression was used in the Pennsylvania case and all other cases which have been considered by the courts or commissions, or, to put it another way, whether they can be required to switch for the Tennessee Central because of their joint terminal arrangements at Nashville.

(3) In the Pennsylvania case that company insisted that the Commission was without power in any event to require it to switch for the Rochester road, because to do so would take its property without due process of law. The court held that the constitutional provision did not apply. We accordingly are making no such contention here.

(4) Neither will there be found in appellants' briefs any contention that to require us to switch for the Tennessee Central will be requiring us to give the use of our tracks and terminal facilities to another carrier engaged in like business. We are making no such contention, but, as stated above, admit the right of the Commission to require us to switch for the Tennessee Central if we are switching for each other.

The Government seems to have wholly misunderstood our argument (L. & N. Brief, p. 44) upon this proviso to Section 3 of the Act to Regulate Commerce. That proviso reads as follows:

> "but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Our insistence is that this proviso limits Section 3 (the section on discrimination that requires the giving of equal facilities) by declaring that it does not mean that a railroad shall be required *to admit another railroad to the physical use of its tracks or terminal facilities.* We assert, then, as shown by the cases cited in L. & N.'s brief, pages 51-53, that a railroad is free to make contracts covering this physical use of its tracks and terminal facilities by another railroad without being guilty of discrimination in refusing to grant similar privileges to other railroads.

Since, therefore (stating it most strongly against ourselves), what the plaintiffs have done in Nashville is to give each other trackage rights over certain individually owned tracks for joint use in connection with their central jointly owned terminals, which is perfectly lawful, and since the proviso to Section 3 definitely limits the earlier part of the section relating to discrimination by declaring that it does not apply to tracks or terminal facilities, it necessarily follows that there is no discrimination against the Tennessee Central in merely refusing to admit it to like physical use of plaintiffs' tracks and terminal facilities. Yet to give such access to the Tennessee Central would be the only thing that the appellants are doing for each other, and only thus could they put the Tennessee Central upon anything like the same basis that they occupy with respect to each other's tracks. If, then, it is not entitled to this, neither is it entitled to a substitute for this—the switching of its cars, a thing wholly different from what the appellants do for each other—simply because that substitute will produce for the Tennessee Central a result somewhat similar in effect to, but wholly different in fact from, the relation existing between the two appellants.

No stronger authority than this very Pennsylvania case can be found in support of the distinction we are here insisting upon. It also clearly recognizes the principle for which we contend, that the proviso to Section 3 stays the hand of the Commission in the matter of, and leaves in the carrier the sole control of, *the physical use of its tracks and terminals*. From this it results that a contract under which another carrier acquires use of them affords no ground for a third carrier demanding participation in such contract or an equivalent therefor in the way of switching service. The Supreme Court, speaking through Mr. Justice Day, makes this distinction between "switching" and the physical use of terminals in the Pennsylvania case (236 U. S., 368); thus:

> "In the present case we think there is no requirement in the order of the Commission amounting to a *compulsory taking of the use of the terminals* of the Pennsylvania Company by another road, within the inhibition of this clause of Section 3. The *order gives the Rochester road no right to run its cars over the terminals* of the Pennsylvania Company or *to use or occupy its stations or depots* for purposes of its own. There is no requirement that the Rochester Company be permitted *to store its cars in the yards of the Pennsylvania Company* or to *make use of its freight-houses or other facilities;* but simply that the Pennsylvania Company *receive and transport the cars* of the Rochester Company over its terminals at New Castle *in the same manner and with the same facilities that it affords to other railroads connecting with the Pennsylvania Railroad at the same point.*"

This was a mere switching service.

Recognizing that the Pennsylvania could be required to do for the Rochester road only what it was doing for its other three competitors, this court said:

> "So, in the present case, all that the order requires the Pennsylvania Company to do is to receive and

> transport over its terminals by its own motive power, for the Rochester Company, *as it does for other companies, similarly situated*, carload freight in the course of interstate transportation" (p. 369).

And, again, in its concluding statement:

> "So here there is no attempt *to appropriate the terminals* of the Pennsylvania Railroad to the use of the Rochester Company. What is here accomplished is only that the *same transportation facilities* which are afforded to the shipments brought to the point of connection over tracks used in common by the Baltimore & Ohio Railroad and the Rochester Company, *shall be rendered* to the Rochester Company as are given to the Baltimore & Ohio Company *under precisely the same circumstances of connection for the transportation of interstate traffic. All that the Commission ordered was that the company desist from the discriminatory practice here involved*, and in so doing we think it exceeded neither its statutory authority nor any constitutional limitation, and that the district court was right in so determining" (p. 371).

So important, however, did Mr. Chief Justice White conceive this distinction to be that lest there should be some misunderstanding of the opinion he filed a dissenting opinion for the sole purpose of making perfectly clear the limited extent to which that case went, by reiterating that it merely requires a railroad to grant the same *switching privileges* to all railroads alike, and is "concerned alone with that subject, and does not in any degree whatever as a matter of law involve *the right of one railroad company to compel another to permit it to share in its terminal facilities.*"

His statement is as follows:

> "The court now holds that this controversy involves *merely a switching privilege* and the duty of one railroad not to refuse such privilege to another, or at all events if it permits it to one, to allow

it to other roads on terms of equality. By a necessary inference, therefore the decision now made is concerned alone with that subject and does not in any degree whatever as a matter of law involve the right of one railroad company to compel another to permit it to share in its terminal facilities" (p. 372).

The Nashville Coal Case.

The Government's second and only other reliance is the decision in Louisville & Nashville Railroad Co. *vs.* United States, 238 U. S., 1, commonly known as the Nashville Coal case. This was decided by the courts—the district court in 216 Fed., 672, and this court in 238 U. S., 1—solely upon the *facts set forth in the opinion of the Commission* in 28 I. C. C., 527. As explained in our original brief, that case for the most part related to *coal rates* to the city of Nashville. Thirteen pages of the opinion deal with this rate feature. Then toward the end of the opinion about two pages are devoted to the purely incidental question of *switching coal.* The switching branch of that case did not involve the question of *switching competitive freight,* which is involved here, but related merely to the *discrimination* incident to the practice of plaintiffs *not switching coal* for the Tennessee Central when they switched all other non-competitive freight for it. The L. & N. and the N., C. & St. L. claimed that coal, even though non-competitive traffic (that is, coming from points not reached by their rails) was nevertheless a competitive commodity, and hence they did not switch it. The Commission and courts rejected this contention upon two grounds: First, because to switch other non-competitive commodities for the Tennessee Central and not switch coal was a discrimination against coal, and, second, because the Commission held as a fact that they *switched coal for each other,* and hence discriminated against the Tennessee Central in refusing to switch coal for it. It was this feature of the case which brought up a dis-

cussion of what they did for each other. Whatever may have been the nature of the proof before the Commission none of it ever came to the eyes of either the district court or this court, for when the suit was brought to attack the Commission's order the record before the Commission was not made a part of the bill, and was not put in evidence at the hearing. Both the district court and this court, then, accepted, as conclusively established, *the facts found by the Commission in its report.* This appears in both opinions and is expressly admitted by the Government in this case (Br., p. 10). In fact, according to the opinion of the district court, counsel, who was evidently relying largely upon certain constitutional and other legal defenses to the order, expressly admitted, for the purposes of that suit, that the facts found by the Commission were supported by substantial evidence and hence were not reviewable by the court.

The court thus states it:

> "The petitioners did not file the transcript of the record before the Commission, and do not insist, for the purposes of the motion, that the facts found by the Commission were either without substantial evidence to support them or contrary to the indisputable character of the evidence. The sole grounds of the motion for the interlocutory injunction are: (1) That the *facts found by the Commission* do not as a matter of law support the orders made by it; (2) that the Commission was without jurisdiction to make the orders; and (3) that the enforcement of the orders made by the Commission will result in the taking of petitioners' property without due process of law and in violation of the Fifth Amendment of the Constitution of the United States" (216 Fed., 675).

From statements made by members of the court at argument it is manifest that counsel for appellants in the Nashville Coal case, *supra,* did in his argument discuss the terms of the joint terminal arrangement. Whether induced to this by his zeal or by questions from the court the writer does not know, and in the hurried preparation of this reply, prac-

tically overnight, is without opportunity to ascertain, but there was absolutely nothing in the record from which the court could form any real conception as to that arrangement—its terms, scope, methods, or any other fact from which its legal status and effect could be ascertained.

For convenient reference we insert as an appendix to this brief all of the Commission's report that relates to the switching branch of that case. From this it will be seen that the first paragraph of the report on this feature, making about twenty lines in the report and the only part dealing with the relations of the two companies, constitutes the entire record that was properly before this court upon this joint terminal arrangement. We quote this paragraph here, as follows:

> *"The Nashville Switching Situation.*
>
> "The Louisville & Nashville Terminal Company is a corporation chartered in 1903, and its entire capital stock of $100,000 is owned by the Louisville & Nashville. Of the $2,535,000 funded debt, bonds to the amount of $2,500,000 are outstanding in the hands of the public, the remainder being held in the treasury of the Louisville & Nashville. These bonds are guaranteed by the Lousiville & Nashville and the Nashville, Chattanooga & St. Louis. The terminal company owns certains terminal stations, 1.07 miles of main line, and 30.32 miles of sidings. In 1896 all of its property was leased for 999 years jointly to the Louisville & Nashville and the Nashville, Chattanooga & St. Louis at a rental of 4 per cent per annum upon the cost, the amount to be paid by each company being determined on basis of use. The operating expenses are prorated upon the same basis. Both the Louisville & Nashville and the Nashville, Chattanooga & St. Louis have individually owned tracks which they operate independently each of the other or of the terminal company, and upon these tracks industries are located. To and from these industries as well as to and from those on the rails of the terminal company traffic of all kinds is freely interswitched by the Louisville & Nashville and the Nashville, Chattanooga & St. Louis."

Without a word of explanation, the statement begins with a description of the Terminal Company—the corporation which has been defunct, except as title holder, since its lease in 1896. There is not a line about the entire joint terminal arrangement, except the above single enigmatical statement about operating expenses. But this is followed immediately by the statement that "both the Louisville & Nashville and the Nashville, Chattanooga & St. Louis have *individually owned tracks* which they *operate independently each of the other or of the terminal company,*" adding, to show that they are regular industrial tracks, "and upon these tracks industries are located."

No one can understand or reconcile the confusion and conflict of expression here found. It is no wonder, then, that this court referred (238 U. S., 18) to the "complication arising out of *joint ownership* and the *fact that each of the appellants switches for the other.*" It was, indeed, a complication which could not be unraveled from that record, but the whole situation is perfectly simple in this record, the truth being, as is now indisputably established, that *both the elements in the court's dilemma did not exist.* There was the joint ownership, but not the switching for each other.

There is not a line nor a word of evidence in this record even tending to show that these two railroad companies "have individually owned tracks which they *operate independently of each other,*" or that between the industries upon such tracks "traffic of all kinds is *freely interswitched* by the Louisville & Nashville and Nashville, Chattanooga & St. Louis." Exactly the reverse of these facts is irrefutably established by all the evidence in this record. All the individually owned tracks within the switching limits of Nashville have been contributed to this joint arrangement so that each has equal trackage rights over all, and they are operated, none individually nor independently, but all jointly by the joint operating agency. Furthermore, there is neither between these so-called independently owned tracks nor elsewhere any interswitching by the two com-

panies. Neither switches for the other anywhere, but all switching is done by the joint agency. Yet this erroneous finding by the Commission is the very fact upon which the district court and this court based their conclusions of discrimination.

The district court, in setting out the facts upon which its opinion was based, taken from the Commission's opinion, said:

> "That both the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway also *individually own tracks which they operate independently of each other* or of the Terminal Company, and upon which industries are located; that traffic of all kinds is *freely interchanged by the Louisville & Nashville Railroad and Nashville & Chattanooga Railway to and from these industries* as well as to and from those on the rails of the Terminal Company; that the tariffs of the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway provide that no charge will be made for *switching between their respective lines* at Nashville, the expense of this service presumably being absorbed by the line bringing in the traffic" (216 Fed., 681).

Again, in discussing the effect of the Commission's order, that court said:

> "Obviously its only effect is to require the petitioners to receive cars of coal from the Tennessee Central Railroad at junction points and to switch and deliver the same to industries along their respective lines, *in like manner as they receive such cars from one another and switch and deliver the same,* upon a just, reasonable and non-prohibitive switching charge, which they may themselves establish, but *which shall be the same as they shall respectively make to one another*" (216 Fed., 684).

It will also be recalled that there is no switching charge in connection with appellants' joint-terminal arrangement.

This court thus stated its understanding of the basis of the Commission's order, which was under attack, and which it approved, thus:

> "In this case the controlling feature of the Commission's order is the prohibition against discrimination. It was based upon the fact that the appellants were at the present time *furnishing switching service to each other on all business,* and to the Tennessee Central on all except coal and competitive business" (p. 20).

And again:

> "It found that *each switched for the other* and both switched for the Tennessee Central, except as to 'coal and competitive business.' It found that such a *switching practice was unreasonable and unjustly discriminatory,* and that a 'reasonable practice would permit the switching of coal from the interchange of each carrier to industries on the rails of each other" (p. 17).

In enumerating several things which the Commission did not do the court thus states what it actually did:

> "Neither did it direct the appellants to establish a joint rate and a through route with the Tennessee Central. Neither did it order the appellants to give the use of their terminals to the Tennessee Central, but only required them to render to the latter *the same service that each of the appellants furnishes the other in switching cars* to industries located in and near the yard" (p. 18).

This single statement shows how different the present case actually is from what this court thought the Nashville Coal case was. Elsewhere, also, in the opinion the court mentions several times the fact that the petitioners switch for each other.

The Government in its brief, page 7, nonchalantly asserts of that case that "the *record and issues* before the court were

substantially the same as presented in this case," and, again, that "the *evidence before the Commission* and its findings of fact were *substantially the same* in both cases." These statements are wholly without support for they are entirely outside the record, since the evidence heard by the Commission in the Coal Case is not only not in this case, but was not even in the record of that case, and has never been considered by this or any court.

this or any court.

The case which we are trying today is upon a record of its own, where the issues were clearly made up and ample opportunity was given to both sides to take proof upon those issues, and where the facts are all before the court. It will not, we are sure, be determined by the opinion of this court in an entirely different case involving different issues and different proof, particularly where none of the evidence was presented to the court, but its decision was based solely upon an assumed fact, which the evidence in this case indisputably disproves.

The Interstate Commerce Commission's Brief.

The statement of the case, found in the "synopsis and index," doubtless through inadvertence, conveys the impression that the plaintiffs had been switching for each other and discriminating against the Tennessee Central before the joint agency was effected.

To correct this we call attention to the fact, stated in both the Commission's report and the district court's opinion, that the switching arrangements between the L. & N. and the N., C. & St. L. were in existence only prior to August, 1900, at which time the Union Station and other joint facilities were completed, the exchange track arrangement was effected, and the joint terminal operation began. This was nearly two years before the Tennessee Central came into Nashville. This joint owning and operating arrangement

has been in effect continuously since 1900, so that the two constituent companies have never switched for each other since the Tennessee Central was built.

For clearness' sake we here call attention to the fact that Mr. Keeble's definition of the Nashville terminals in the Commission's brief is hardly complete. The full plan under which this joint agency was formed and operated is clearly set forth in the report of the Commission and the opinion of the district court.

Under the title of "Questions Involved" counsel says that, in view of the essential facts being practically admitted, the sole question in this case is: "Did the Interstate Commerce Commission have the power to make the order in question?"

This statement of the question is not strictly correct, for we do not deny the power of the Commission to enter its order requiring switching from the Tennessee Central, if in point of fact the two railroads were each rendering the same sort of service for each other, that is, were switching for each other, because the Commission's power to do so is definitely established in the Pennsylvania case, *supra*. But if counsel refers to the power in the sense of the legal right to make the order under the facts shown in this case, namely, that the two constituent companies did not switch for each other, but owned and operated terminals jointly each having trackage rights through the joint agency over the tracks of the other, then the proposition is fairly stated, and our contention is that such an arrangement was not a discrimination at common law (A., T. & S. F. Co. *vs.* Denver, etc., Co., 110 U. S., 668), and in like manner is not a discrimination under the proviso to section 3 (the section on discrimination) of the Act to Regulate Commerce, because the proviso withdraws from the domain of this statutory discrimination at least contracts providing for the *physical use of tracks and terminal facilities*. If so, of course, plaintiffs could not be ordered to admit the Tennessee Central into their arrangement, and likewise such joint arrangement cannot legally be made the basis of an order to do something

else which would give the Tennessee Central commercial access to the joint terminals, and that upon even more favorable terms than being admitted thereto, since under the proposed switching order it would enjoy them for a nominal switching charge without having to bear any of the cost of construction, maintenance or operation, including the annual $100,000 interest charge and other overhead expenses.

Taking up the argument of the Commission's brief, we will, for convenience, quote and briefly consider each of the propositions relied upon.

I.

"The Commission's Findings of Fact, if Based upon Substantial Evidence, Are Conclusive."

We do not controvert this doctrine, but we do counsel's statement that, even though the evidence be undisputed, the question of unjust discrimination, as presented in this case, is one of fact. We discussed this at page 59, *et seq.*, of the L. & N.'s original brief. The doctrine is well established, as stated by the lower court in this case, citing, among others, the Pennsylvania case, *supra*, that—

> "a conclusion which plainly *involves, under the undisputed facts, an error of law*, or which is shown to be *supported by no substantial evidence* or to be *contrary to the indisputable character of the evidence, thereby likewise involving an error of law*, will be so reviewed" (vol. 1, p. 61).

The court is not asked here to substitute its own conclusion of fact for that of the Commission. There is no question as to the facts. The controversy is whether or not the undisputed facts constitute a discrimination such as authorizes the Commission's order requiring the plaintiffs to switch for the Tennessee Central. This question is purely statu-

tory, involving the meaning and application of section 3 of the Act to Regulate Commerce. It is whether a joint owning and operating terminal arrangement is a facility that comes within the operation of the statute, and hence must be furnished equally to another carrier that has not participated in the acquisition, construction, maintenance or operation thereof; or, if a facility, whether it is withdrawn from the operation of the statute by the proviso which forbids requiring a carrier to give physical access to its tracks and terminal facilities. Attached, as it is, to the main statute requiring the giving of equal facilities, it is manifest that this proviso was intended at least to cover the case of a carrier affording physical use of its tracks and terminal facilities to one carrier and refusing it to another.

II.

"The Finding of the Commission that the Louisville Company and the Nashville Company Were in Effect Switching for Each Other Was Supported by Substantial Evidence."

It is interesting to note that after searching this record of nearly 600 pages, counsel, under this important subsection of his argument, is able to present only two bits of so-called evidence in support of the claim that the plaintiffs switch for each other. First, he quotes (Commission's Brief, p. 11) from a letter of the Third Vice-President of the Louisville & Nashville to T. M. Henderson, Commissioner of the Traffic Bureau of Nashville, of September 4, 1913, in reply to Mr. Henderson's request for reciprocal switching arrangements at Nashville, the following language:

> "Reciprocal switching arrangements between railroads means what the term, on its face, implies; that is, *approximately equal service and facilities are to be afforded by each of the two or more interested lines.* Reciprocal switching arrangements necessarily must

> mean that the service performed by each for the other shall, to an approximately equal extent, *justify* the same."

It is unfortunate that counsel did not read the very next sentence, which is as follows:

> "That this latter condition does not now exist at Nashville, so far as the respective Tennessee Central and L. & N.-N., C. & St. L. facilities are concerned, of course, must be quite well known to you; there would be absolutely no reciprocity" (vol. II, p. 987).

From this it will be seen that the "equal service and facilities" mentioned referred to a comparison between those of the Tennessee Central, upon the one hand, and those of the L. & N. and N., C. & St. L. upon the other, and not as between the L. & N. and N., C. & St. L. The use of the hyphen between L. & N. and N., C. & St. L. shows that Mr. Smith was treating these two companies as one in the matter of industries and switching facilities, and was comparing the combination with the Tennessee Central.

However, even if Mr. Smith's language had been susceptible of the construction that he considered the plaintiffs were exchanging switching facilities, it would not have changed the facts from what they are indisputably shown to be, and the court would apply the law to those facts and not to a casual conclusion from them, even if stated by an official. However, Mr. Smith did exactly the opposite from what he was opposed by counsel to have done.

The next and only other evidence stated as the basis of the claim that plaintiffs switch for each other is the fact that the engines in use by the joint agency are actually owned, each of them, by one or the other of the two constituent companies. From this the argument is drawn that an L. & N. engine at times hauls N., C. & St. L. cars, and *vice versa*. This point vanishes, however, when it is recalled that the contract for the joint operation of these jointly owned or controlled terminals provided that the switch engines should

be contributed to the joint agency by the two constituent members and thereupon become, for the time being, the equal and joint property of the two, for which they paid a rental of 4 per cent of the value to the primary owner. This appears from section 10 of the joint operating arrangement (vol. 2, p. 384), which is as follows:

"X.

"The parties hereto shall set apart, allot, and appropriate solely to the use of Nashville Terminals, in good working order, a certain number of switching engines, fully adequate and competent to perform all the work of switching, pulling, and shifting trains and cars in and about the terminals, of which whole number of engines *each of the parties hereto shall furnish a proportion corresponding in economic efficiency to the respective proportions of work to be performed for the parties hereto.*

"As compensation or rent for the engines so set apart, allotted, and appropriated for and to terminal uses and purposes, Nashville Terminals *shall pay* to the parties hereto, *in addition to maintenance and repairs hereby assumed by Nashville Terminals, four per centum per annum upon a valuation of said engines, to be made at the time of allotment* by the superintendents of machinery of the parties hereto and a third person to be chosen by the said superintendents."

Mr. Stowe, the superintendent of the joint agency, whose testimony upon this subject is quoted by counsel under this heading, himself refers to this assignment to the joint agency of each company's proportion of the engines needed for yard service. The foregoing shows clearly that when an engine is thus assigned to the joint agency it becomes, while so used, the instrument of the joint agency.

III.

"The Finding of the Commission that the Louisville Company and the Nashville Company Were in Effect Switching for Each Other Was Supported by the Decision of This Court in Louisville & N. R. Co. vs. United States, 238 *U. S.,* 1."

We have discussed this case *supra* in reply to the brief of the Government. We will, however, add the statement here that the court considered the question in that case primarily one of commodities is shown on page 19, where it says:

> "The carriers cannot say that the yard is a facility open for the switching of cotton and wheat and lumber, but cannot be used as a facility for the switching of coal."

It will be remembered that the yard was not even open for the first-named commodities except when they constituted non-competitive traffic, that is, traffic going to or from points not reached by the plaintiffs' rails, for which accordingly it did not compete.

IV.

"Discrimination by the Nashville Terminals, the Joint Agent of Appellants, is No More To Be Justified under the Act Than Would Be Discrimination by Either of Its Principals."

This proposition badly confuses the issue. The joint agency is not a distinct entity, separate from the two companies. It is simply the quasi-partnership through which the joint employees are controlled and the accounts are kept. It cannot, therefore, be said that the joint agency as such can discriminate against the Tennessee Central, since there

is no other railroad with whose treatment that of the Tennessee Central can be compared. In other words, there is not a fourth railroad which the two joint owners admit to their joint arrangement while excluding the Tennessee Central.

Under this heading counsel also discuss what would be the law if the Nashville terminals were, in fact, a terminal company. Since they do not constitute a terminal company, the inquiry is perhaps immaterial, but, in view of one of the members of the court having propounded a similar question to counsel at the argument, we answer that the difference, as was recognized in the Peoria case cited by counsel (St. Louis, S. & P. R. Co. *vs.* P. & P. U. Ry. Co., 26 I. C. C., 226), is as great as it is in the constitution of the two agencies. The very ground upon which the Commission in that case required a terminal company to switch for all railroads in the city of Peoria was the fact it was *formed for that purpose*, and that, as it did not engage in *road-haul transportation*, it had no road-haul revenues to lose by performing switching service for the roads desiring that service. In our case the joint agency of the two constituent companies does not hold itself out as a terminal company, but, on the contrary, is distinctly a transportation company, its terminals, like those of all line-haul railroads, being mere aids and incidents to the transportation service.

It is true, as counsel says, that the order of the Commission does not require a consolidation with the joint agency nor the admission of the Tennessee Central to a physical use of its tracks and terminal facilities. Counsel state that the Commission has "merely required that the appellants place the Tennessee Central on an equal footing with the Louisville Company and the Nashville Company in the matter of interchange of track at Nashville." But the order of the Commission which undertakes to accomplish this result confessedly does it solely because of an alleged unjust discrimination, which, it is claimed, grows out of the existing joint-

terminal arrangement of the plaintiffs. The order of the Commission is not, and could not, be a specific direction to the plaintiffs to switch for the Tennessee Central, but merely *to cease its alleged discrimination*, for, as this court has expressly held, the Commission, in all orders against discrimination, is forbidden to select either alternative, but must leave the option to the carrier—necessarily in this case of switching for the Tennessee Central, or discontinuing its joint-terminal arrangement, the latter a practical impossibility.

V.

"The Nashville Terminals, if Given the Effect Appellants Claim for it, Would Constitute a Monopoly; and the Commission Properly Refused to Give It That Effect."

Both the Commission and the courts have repeatedly held that the Interstate Commerce Commission has no powers in the administration of the anti-trust acts, and it is not claimed that this proceeding was brought under those statutes. Counsel insist that this arrangement "is a clear suppression of competition, a flagrant discrimination against competitive traffic." The basis for this position is counsel's statement that "in the absence of the joint arrangement, neither of those principals might lawfully refuse to switch for the Tennessee Central merely because the traffic offered might have come in or might go out over its own lines." Counsel are in error in this statement, since the Commission itself, in the Louisville switching case, which is discussed, with quotations therefrom, at pages 28 and 29 of the L. & N.'s original brief, distinctly holds that a carrier may lawfully refuse to switch traffic for a competitor, which it could itself handle to or from the destination or origin—in other words, competitive traffic as that term is used in this case and as described in the above statement of counsel. It is held in the

Louisville case, just as it was held in the Pennsylvania case, that the switching of competitive traffic can only be required where the element of discrimination exists—that is, where the carrier doing the switching is voluntarily switching such traffic for some other carrier.

VI.

"The Limitation upon the Power of the Commission in Establishing Through Routes, under Section 15, is Not Applicable in This Case."

Counsel misconceive our position. The assignment of errors and our briefs show that we do not contend that this switching could not be ordered because the carriers owning the terminals would thus be required to short-haul their own lines.

The provision in section 15, which forbids the Commission to require a carrier to unite in a through route unless it is allowed its long haul, is an unanswerable argument where, independent of discrimination, one carrier asks that another carrier be required to switch competitive business for it, for the carrier originating the business would be turning over its transportation service and getting merely a switching charge; but it does not apply here, since we concede that under the Pennsylvania case, if these carriers are switching for each other they can lawfully be required to switch for all other carriers in the same city.

VII.

"The Commission Has Power to Require the Removal of Discrimination in Whatsoever Guise it May Appear."

Counsel argue that Congress must be presumed "to have realized that carriers would resort to every conceivable device to effect discrimination in evasion of the act." This is a

suggestion that this joint arrangement is a device. The Commission did not so find and there is not a scintilla of evidence in the record to justify any such theory. On the contrary, the fact that these two carriers, then the only railroads in Nashville, acquired the property and subsequently built the joint terminals at a cost of more than $2,500,000 in furtherance of this joint operating plan and that this work was completed and the plan put into effect two years before the Tennessee Central was built in Nashville, is conclusive of this suggestion of a device. It is true that the lower court, but not the Commission, suggests that if this arrangement should be approved as an exchange of trackage rights, it might induce carriers in other cities to switch for each other through the device of an exchange of trackage rights. But, as we have seen, no such case as that is presented here. The exchange of trackage rights only related to the individually owned terminal tracks leading to the central terminals, which they *owned jointly* and in which they had invested this large sum of money. Whatever may be done by other railroads in the future there is certainly nothing shown in this case to impeach the absolute good faith of this transaction as well as its entire propriety, considered from the standpoint of economy and safety in the operation of the terminals. Besides it is a great accommodation to the public, since all of the 240 industries upon the joint tracks have access to all stations upon both the L. & N. and the N., C. & St. L., without paying any switching charge upon either competitive or non-competitive business. In other words, each railroad owns all of these terminals, and therefore treats them, and properly so, as a part of its own line and applies the simple Nashville rate.

VIII.

"The Order of the Commission Does Not Require Appellants to Give the Use of Their Tracks or Terminal Facilities to Another Carrier Engaged in Like Business."

We do not controvert this proposition, if counsel means the physical use of the tracks and terminal facilities, which meaning is clearly referred to in the quotation given. On the contrary, we insist that the proviso to section three absolutely forbids the Commission requiring the L. & N. or N., C. & St. L. to give the physical use of its tracks and terminal facilities to the Tennessee Central, even though they should give them to each other. But we would remind that these terminals consist only in part of exchanged trackage rights, the principal central terminals being absolutely owned jointly. Our complaint of the Commission's action is that it has taken this perfectly lawful arrangement between these two carriers as the basis for reaching the conclusion that they thereby unlawfully discriminate against the Tennessee Central and orders us to switch for the Tennessee Central. In other words, as stated elsewhere, it declares a lawful arrangement to be an unlawful discrimination, and upon the strength of such declaration, since it does not, and it cannot, order the alleged discriminators to do for the other carrier what they do for each other, it makes that alleged unlawful discrimination the basis for requiring the alleged discriminators to do not the same thing, but something else, for the third railroad—this substitute being even more beneficial to it than the thing the two roads were doing for each other.

As illustrative of the confusion of mind which this case induces even in one who has made a careful study of it, we call attention to the statement of counsel at page 26 of his brief that "the only material difference between the New Castle Switching Case and the case at bar is that the

latter involves a contract between appellants which, it is claimed, gives to each of them trackage rights over the terminal lines of the other, whereas no such contract appeared of record in the New Castle Switching Case." There is not a suggestion in the New Castle Switching Case of an exchange of trackage rights, either by agreement of record or otherwise. On the contrary, it distinctly appears that that case involved merely a switching service. The Pennsylvania Railroad, in the regular way, switched cars for three of its competitors. That is, it moved those cars between the industries on its tracks and the point of interchange with those competitors, both on inbound and outbound shipments. But it refused to switch for the fourth railroad, the Rochester Company. All that the court decided (and it was stated over and over and doubly emphasized by Mr. Chief Justice White's separate opinion) was that the Pennsylvania should switch for the Rochester Company solely because it switched for the other three.

Counsel here state that since this case was tried the switching charge has been litigated and that the Commission has fixed a maximum rate of $5 per car. Counsel say that this is a simple solution of the difficulties attendant upon compliance with the Commission's order. It is immaterial whether compliance with the order is difficult or easy. The question is whether or not the order is right. But it may be noted in passing that since the two carriers are distinctly required to maintain the same charge against each other that they do against the Tennessee Central, the result will be, contrary to the wishes of the two constituent companies and greatly to the damage of the public, that they will now be required to make a switching charge of $5 per car, that is, add that much money to the regular Nashville rate, when, under previous conditions, the Nashville rate alone bought the transportation to and from every industry upon the terminal tracks of the appellants.

In the conclusion of the Commission's brief reference is

made to the order. It is not claimed anywhere that the fact that the appellants switch non-competitive traffic for the Tennessee Central affords any ground for requiring them to switch competitive traffic. The two are wholly different. But lest this might not be understood, we state, in supplement to what was said in the original brief at page 30, that when the Commission made the alternative order that appellants should switch for the Tennessee Central competitive and non-competitive traffic upon the same terms, so long as they switched non-competitive and competitive for each other upon the same terms, it meant to cover two things: (1) to require them to do competitive switching, and (2) to require them to do it at the same charge that they were then making for non-competitive, that is, $3 per car, because of the alleged fact that they were switching competitive and non-competitive for each other upon the same terms.

In bespeaking the court's careful consideration of this case, we remind it not only of the great amount immediately involved—an annual loss of over $190,000 by appellants in net road-haul revenues, to which, by all recognized standards of right, they are entitled—but also of the fact that if the Commission's order be sustained, it will become a precedent to disturb the status and affect the value of many other terminal arrangements throughout the country. Neither is its novelty to be overlooked, this being the first instance of an attack of this kind upon these well-known and supposedly lawful agencies. And then there is its simplicity, the single problem being, as suggested by the query of a member of the court at the argument, not what are the terms or conditions or history of the arrangement, but, granting that it exists, is it in law a facility under Section 3 of the Act to Regulate Commerce, which, if refused to other carriers, becomes an unlawful discrimination that entitles the outside carriers, solely on that account, to acquire some sort of beneficial interest in or use of these terminals?

We leave this question with the court, earnestly urging

that it be considered upon its own merits, regardless of that other, and wholly separate, case relating to certain switching practices at Nashville, which came up on a motion for a preliminary injunction, principally to test certain constitutional and other legal questions, and was tried without any of the evidence before the Commission, counsel for plaintiff agreeing (but, of course, merely for the purpose of that suit) that the Commission's findings of fact should be taken as proven. And especially do we ask this, in view of the uncontradicted record evidence showing in the instant case that, of the facts thus found by the Commission, and taken as the basis of this court's decision, the two controlling ones—the alleged independent operation of their individually owned tracks, and switching for each other—are absolutely untrue, and in view of the further fact that the order involved in that case lasted only two years, so that no hardship, confusion, or discrimination can result from a different decision in the present case.

Respectfully submitted,

EDWARD S. JOUETT,
For Appellants.

H. L. STONE,
W. A. COLSTON,
J. B. KEEBLE,
CLAUDE WALLER,
Of Counsel.

APPENDIX.

This contains all of the report of the Interstate Commerce Commission in Traffic Bureau of Nashville *vs.* L. & N. R. R. Co. *et al.*, 28 I. C. C., 533-542, which refers in any way to the switching branch of the case.

At the close of the opening statement occurs this sentence: "The question of interline switching at Nashville is also placed in issue and will be treated separately herein."

After the coal branch, covering eleven pages, comes the switching branch, beginning at page 540.

It is the first paragraph—twenty lines—that contains all that is said about the joint arrangement.

THE NASHVILLE SWITCHING SITUATION.

The Louisville & Nashville Terminal Company is a corporation chartered in 1903, and its entire capital stock of $100,000 is owned by the Louisville & Nashville. Of the $2,535,000 funded debt, bonds to the amount of $2,500,000 are outstanding in the hands of the public, the remainder being held in the treasury of the Louisville & Nashville. These bonds are guaranteed by the Louisville & Nashville and the Nashville, Chattanooga & St. Louis. The terminal company owns certain terminal stations, 1.07 miles of main line, and 30.32 miles of sidings. In 1896 all of its property was leased for 999 years jointly to the Louisville & Nashville and the Nashville, Chattanooga & St. Louis at a rental of 4 per cent per annum upon the cost, the amount to be paid by each company being determined on basis of use. The operating expenses are prorated upon the same basis. Both the Louisville & Nashville and the Nashville, Chattanooga & St. Louis have individually owned tracks which they operate independently each of the other or of the terminal company, and upon these tracks industries are located. To and from

these industries as well as to and from those on the rails of the terminal company traffic of all kinds is freely interswitched by the Louisville & Nashville and the Nashville, Chattanooga & St. Louis.

Prior to 1907 neither of these roads would switch freight of any kind to or from the Tennessee Central, but in that year, "in deference to public opinion," they began switching all noncompetitive traffic, *except coal,* to and from the Tennessee Central. The charge for this service is $3 per car. Although both roads are emphatic in asserting that they have never even considered the switching of coal from the Tennessee Central, the Nashville, Chattanooga & St. Louis did have effective rates applicable to and from its interchange with the Tennessee Central under which such a movement could have been accomplished for 60 cents per ton. Some surprise was expressed when this fact was developed at the hearing, and shortly thereafter this rate was canceled. Complainants aver that this situation unjustly discriminates against coal from the Tennessee Central, that the practice with respect to switching coal at Nashville is unreasonable, and that the charge therefor (effective until shortly after the hearing) is unreasonable. While the switching tariff of the Tennessee Central is similar to those of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, that road's refusal to switch coal from either of the other lines is in reality a retaliatory measure. It has styled itself a "cross-complainant" and favors this portion of petitioners' prayer. The other defendants insist that to require them to perform this switching would be to compel them to give the use of their terminal facilities to another carrier engaged in like business, in contravention of the proviso of section 3; that their terminals are not now open to any except noncompetitive traffic; and that while coal may come from noncompetitive points, the very nature of the commodity renders it competitive. As to the competitive character of the commodity there is little doubt; but why

this attribute of coal is restricted to that from the Tennessee Central and finds no place with the coal from the Nashville, Chattanooga & St. Louis Tennessee and Alabama fields when it meets the Louisville & Nashville Kentucky coal, or vice versa, is neither clear nor defensible. It may be that these two roads regard themselves as a single entity, due to the ownership by the Louisville & Nashville of more than 70 per cent of the capital stock of the Nashville, Chattanooga & St. Louis; this would explain but not justify. As we said in *Merchants & Mfrs. Ass. of Baltimore v. P. R. R. Co.*, 23 I. C. C., 474, 476, "Terminals are either open or they are not," and a carrier may not exercise an arbitrary discretion, based upon a strained construction of the proviso of section 3, in saying for what roads and what traffic it will open its terminals and for what other roads and traffic it will decline so to do. In this case the joint and the separately owned terminals of each of these two defendants are open to all of the traffic of the other; are open to all noncompetitive traffic to and from the Tennessee Central except coal, and, up to shortly after the hearing, those of the Nashville, Chattanooga & St. Louis were open as to this coal but at a prohibitive rate.

Our conclusion is that the practice of defendants with respect to switching coal at Nashville is unreasonable and unjustly discriminatory; that the present tariffs of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis unjustly discriminate against shipments of coal from the Tennessee Central and unduly prefer shipments of coal from the lines each of the other. We find that a just and reasonable practice with respect to switching at Nashville to be observed by all defendants will permit the switching of coal from the interchange of each carrier to industries on the rails of the other. Defendants will be required to cease the unjust discrimination herein found to exist and to establish and apply for the future the practice herein found to be reasonable. This disposition of the case is in consonance

with the principle enunciated by the Supreme Court in *U. S. v. Terminal R. R. Assn. of St. Louis*, 224 U. S., 383.

The tariffs of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis provide that no charge will be made for switching between their respective lines at Nashville, the expense of this service presumably being absorbed by the line bringing in the traffic. This fact was not developed at the hearing, and no proyor is made for, nor is there any testimony touching upon, the absorption of switching at Nashville. Under their restricted practice no coal has been interswitched between the Louisville & Nashville and the Nashville, Chattanooga & St. Louis on the one hand and the Tennessee Central on the other. A compliance with our order herein will remove this restriction. We can not anticipate unjust discrimination with respect to absorption of switching charges and no finding with respect thereto will be made on this record.

An order in accordance with these findings will be issued.

(32306)

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 308.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., Appellants,

vs.

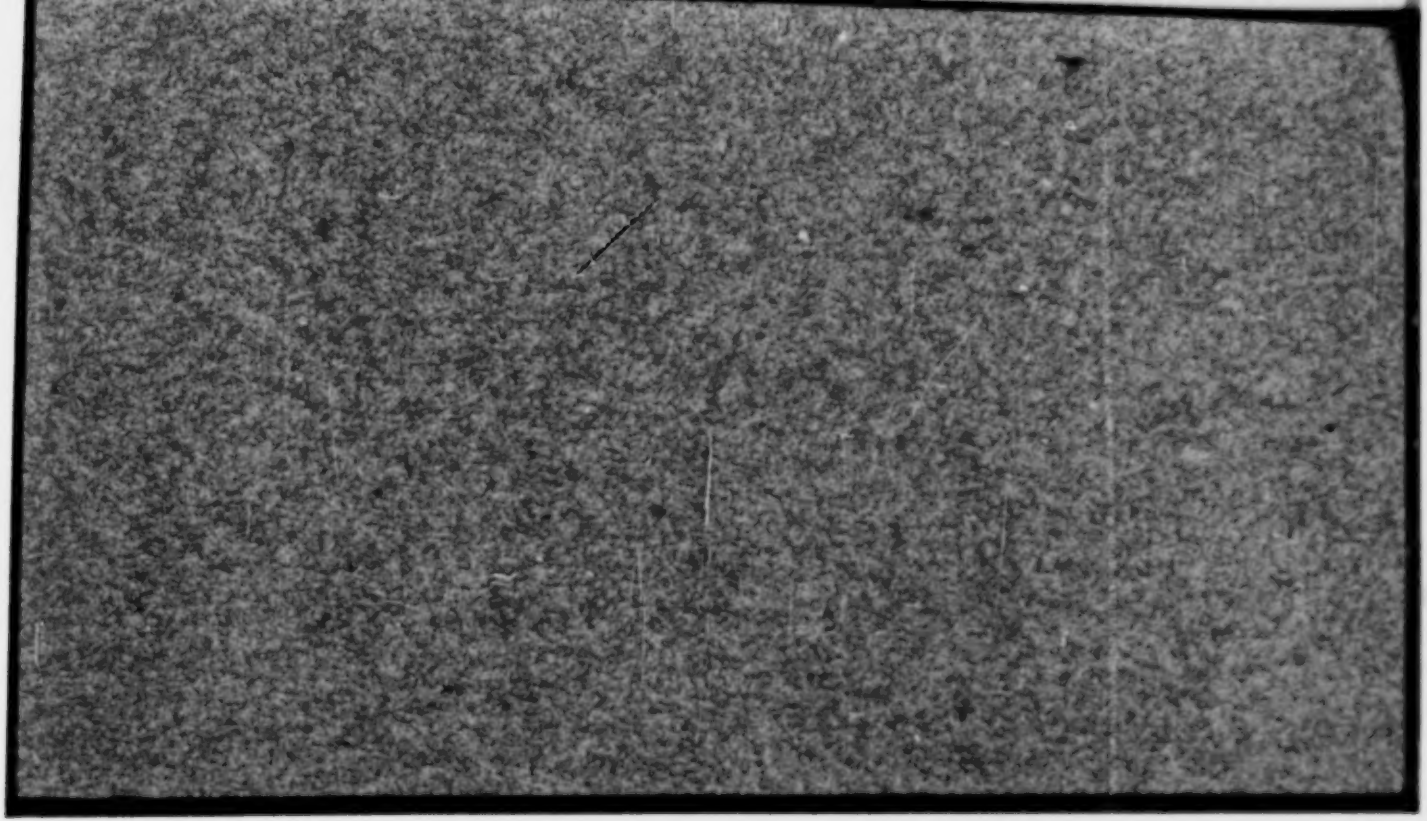
UNITED STATES OF AMERICA, ET AL., Appellees.

Brief and Argument on Behalf of Appellant Nashville, Chattanooga & St. Louis Railway.

E. WALTON HINES,
FRANK W. GRAHAM,
Of Counsel.

CLAUDE WAKEFIELD,
Solicitor for Nashville, Chattanooga & St. Louis Railway.

September 15, 1914.



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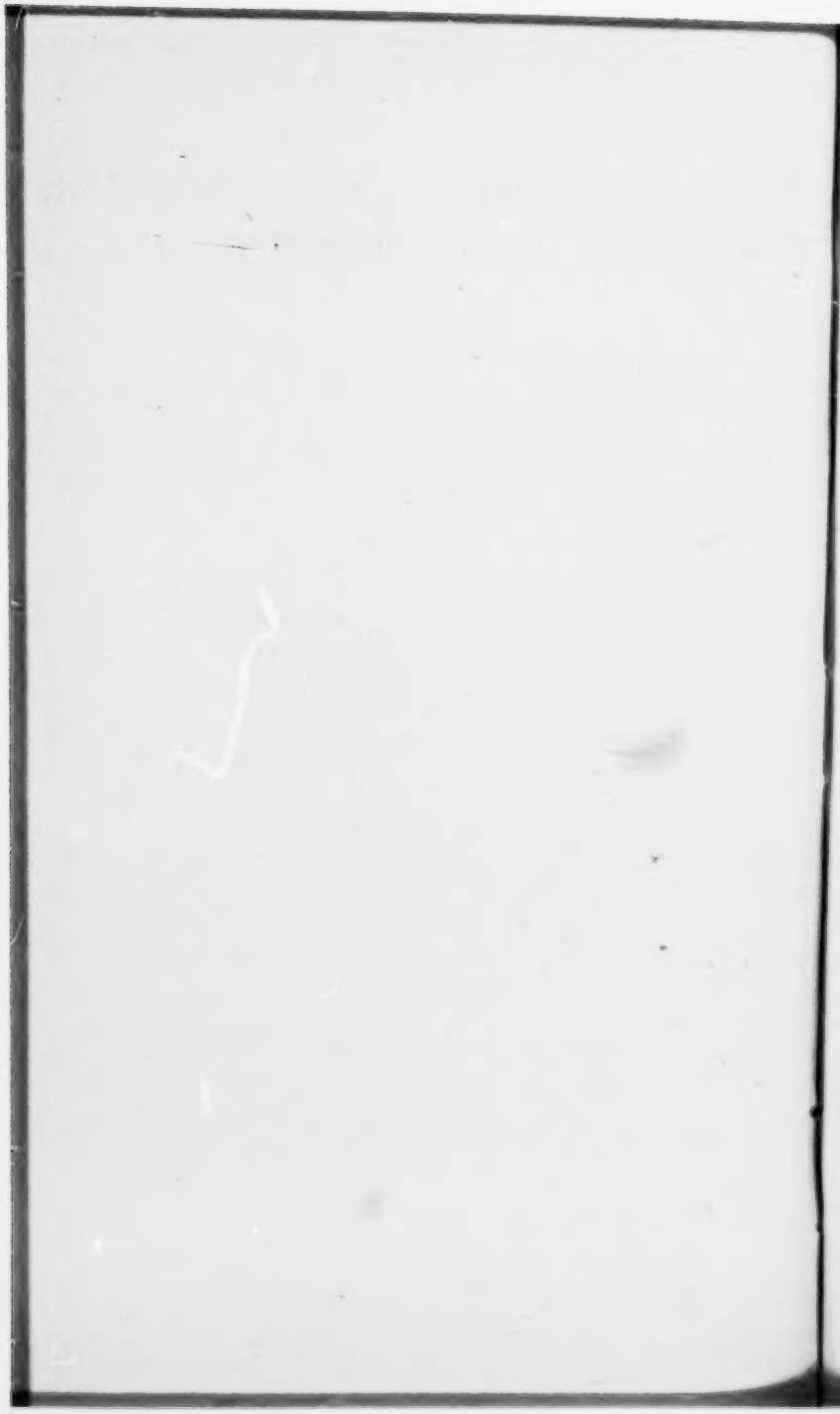

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 290.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - *Appellants,*

versus

UNITED STATES OF AMERICA, ET AL., - *Appellees.*

BRIEF AND ARGUMENT ON BEHALF OF APPELLANT NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

I.

STATEMENT OF THE CASE.

The important question involved in this litigation may be briefly stated as follows: Two railroads at Nashville, Tennessee, jointly own and control a central terminal yard. Each owns separately certain main and industrial tracks connecting with this central yard. The two roads have by agreement placed their separately owned tracks within a prescribed territory together with the jointly owned central yards, under the control of a joint agent which performs all switching operations. Under this agreement the expenses of the joint agency are charged each road according to the number of cars handled for each, respectively. Each car handled is charged to that road which has the transportation haul; that is to say, a car transported by one

road to Nashville is charged to such road, whether it be delivered to an industry located on its separately owned track or to an industry located on the separately owned track of the other road. Again, a car originating at Nashville and transported by one of the roads is charged to such road so transporting it, whether it be loaded at an industry located on its track or an industry on the track of the other road. Each road thereby pays the expenses of switching every car it transports to and from Nashville, though the switching is actually done by the joint agent.

When this agreement was first executed there was no other road at Nashville. Several years after the agreement was put in operation a third railroad entered the city. It had no direct or immediate connection with the jointly owned central yard, but it did connect with one of the old roads at a point about two miles distant from the central yards, and within the territory prescribed for the joint operation of the two roads. The two roads declined to switch competitive traffic for the third road, but they did interchange non-competitive traffic with such road.

The Interstate Commerce Commission, on complaint, held that the operation of the two roads under this agreement was essentially the same as a reciprocal switching arrangement; that the two roads were interchanging traffic with each other, and that they could not refuse to interchange traffic upon substantially the same terms with the third road. (R., Vol. II, pp. 571-588.) An order was entered by the Interstate Commerce Commission to that effect. (R., Vol. II, p. 590.)

This order was assailed by a bill filed by the two roads in the District Court of the United States for the Middle District of Tennessee, upon the ground that neither road was switching for the other; that each had authority to switch its cars upon the

tracks of the other; that each bore the expense of switching its own cars; that there was no switching charge; that the arrangemen did not constitute a "reciprocal switching arrangement;" that there was no unjust discrimination against the third road; and that the practice was not in violation of any of the provisions of the act to regulate commerce or the various amendments thereto. (R., Vol. I, pp. 4-22.)

The District Court sustained the validity of the order of the Interstate Commerce Commission and the cause is now before this Court to review the judgment and decree of the District Court. (R., Vol. I, p. 59.)

II.

SPECIFICATIONS OF ERROR.

The errors assigned are: The District Court erred in holding that the arrangement between the Louisville Company and the Nashville Company was in substance a reciprocal switching arrangement constituting a facility for the interchange of traffic between them; in holding that they were interchanging traffic with each other and so long as they did so it was unjustly discriminatory not to interchange with the Tennessee Central; in not holding the order of the Commission was unwarranted by the evidence; and in denying the application for injunction and dismissing the bill. (R., Vol. I, pp. 84-85.)

III.

BRIEF OF ARGUMENT.

1. The courts are authorized to review a conclusion of the Interstate Commerce Commission when "there is no substantial evidence supporting such conclusion, or such conclusion is contrary to the indisputable character of the evidence."

Louisville & Nashville Railroad Co. v. *United States*, 216 Fed., 672, 679.

Interstate Commerce Commission v. *Union Pacific Railroad*, 222 U. S., 541, 547, 548.

Interstate Commerce Commission v. *Louisville & Nashville Railroad Co.*, 227 U. S., 88, 91, 92, 100.

Florida Line v. *United States*, 234 U. S., 167, 185.

2. There is no substantial evidence to support the conclusion that the plan of operation of the appellants at Nashville, Tennessee, is essentially the same as a reciprocal switching arrangement between them, or that it constitutes facilities for the interchange of traffic between them; that is to say, it does not come within the principle announced in the case of *Pennsylvania Co.* v. *United States*, 236 U. S., 351, where it was held that where a railroad company has opened its terminals to one carrier it is unjustly discriminatory not to open its terminals on the same terms to another carrier similarly situated.

3. On the other hand, the arrangement is essentially the same as both roads acquiring and operating jointly the entire terminals, or the same as each having exchanged trackage rights with the other. Such an arrangement is not contrary to law, nor is it unjustly discriminatory towards a third railroad to deny it participation in such an arrangement.

Section 3 of the Act to Regulate Commerce.

Kentucky & Indiana Bridge Co. v. *Louisville & Nashville Railroad Co.*, 37 Fed., 567, 628.

Oregon Short Line v. *Northern Pacific Railroad Co.*, 51 Fed., 465, 474, 475.

Little Rock, Etc., Railroad Co. v. *St. Louis, Etc., Railroad Co.*, 59 Fed., 400, 4[illegible].

Little Rock, Etc., Railroad Co. v. *St. Louis, Etc., Railroad Co.*, 63 Fed., 775, 778.

Pennsylvania Railroad Co. v. *United States,* 236 U. S., 351, 368, 369, 371.

4. There is no illegality in the two railroad companies acquiring and operating jointly, at a given point, terminal facilities for their common, but exclusive, use.

United States v. *Terminal R. R. Association of St. Louis,* 224 U. S., 383, 405.

IV.

THE FACTS IN THE CASE.

The facts involved in this controversy are in no way controverted. They were fully stated in the opinion of the Interstate Commerce Commission, which will be found in volume 2 of the record, page 511; they are also fully stated in the opinion of the District Court, 227 Fed., 258. Notwithstanding this, for the sake of clearness it is deemed advisable to give here the chronological history of the case, stating as briefly as possible the main facts upon which the order of the Commission was predicated. The appellants in this cause are the Louisville & Nashvilleville Railroad Company, which will hereinafter be mentioned as the Louisville Company; the Nashville, Chattanooga & St. Louis Railway, which will hereinafter be spoken of as the Nashville Company, and the Louisville & Nashville Terminal Company, which will hereinafter be called the Terminal Company.

1. The Louisville Company.

The Louisville Company has two lines of road entering the city of Nashville, one coming into the city from the north, and the other from the south. (R., Vol. II, p. 571.)

The northern line of the Louisville Company when originally constructed, and for many years thereafter, had its terminus

on the west bank of the Cumberland River. At this point it had its station. The original terminus of the southern line was in the southern part of the city, where it had terminal yards. The distance between these two termini was several miles, and for a long time the Louisville Company had no line connecting them. (R., Vol. II, p. 272.)

3. The Nashville Company.

The Nashville Company has two main lines of its railroad entering the city of Nashville. One of these extends from Nashville to Chattanooga, and the other from Nashville, Tennessee, in a westerly direction through the State. The terminal yards of these roads were in the central portion of the city, about midway between the termini of the two roads of the Louisville Company. (R., Vol. II, pp. 272-273.)

3. Connections Between The Louisville Company and the Nashville Company.

In order that the two lines of the Louisville Company might be connected by a track, that company and the Nashville Company entered into an agreement on May 1, 1872, under which the Nashville Company gave to the Louisville Company a right of way for the perpetual use of a railroad track extending from the terminals of the northern line of the Louisville Company to the terminals of the southern line in the southern part of the city. (R., Vol. II, pp. 273-274.)

4. History of the Terminal Company.

In the year 1893, in order to facilitate the construction of convenient and economical terminal facilities, the two companies organized the Louisville & Nashville Terminal Company under an act passed by the General Assembly of Tennessee. On April 27, 1896, the Louisville Company and the Nashville Company

leased to the Terminal Company tracts of ground and appurtenances thereon which each of them respectively owned within or in the immediate vicinity of the terminal grounds of the Nashville Company. By this lease the Terminal Company leased itself to construct upon these premises so leased to it, and other tracts of ground to be secured by it by purchase or condemnation, certain passenger and freight buildings, tracks and other terminal facilities. (R., Vol. II, pp. 1170-1176.)

In order to secure the money with which to construct these facilities, the Terminal Company executed a mortgage for several millions of dollars.

The bonds, secured by the above mortgage, were guaranteed both principal and interest, by the Louisville Company and the Nashville Company. After the execution of said mortgage, the Terminal Company, on June 15, 1898, leased all of its property, including facilities thereafter to be constructed, to the Louisville Company and the Nashville Company jointly.

Under the provisions of this lease, the Louisville Company and the Nashville Company covenanted that they would, at the end of the premises, pay and discharge all taxes, rates, charges, etc., that might be levied upon the property in question during the term of the lease, and as further rent they would pay to the Terminal Company during the term a sum equal to interest at four per cent upon the actual cost of all expenditures that had been made by the Terminal Company, or might thereafter be made, in the construction of the facilities. (R., Vol. II, pp. 1176-1178.)

It should be noted here that under the charter of the Terminal Company and the laws of the State of Tennessee, the Terminal Company was authorized to purchase, lease, acquire, hold and lease to others such real estate as might be necessary for the purpose of its incorporation. It was also authorized to

borrow money for the acquisition, construction, maintenance, etc., of the *terminal facilities*, and to issue and dispose of its bonds, and to mortgage its corporate property. It was also authorized to *lease to any railroad company or railroad companies its freight and passenger depots, terminal facilities, etc.* Railroad companies leasing said terminal facilities *were authorized severally or jointly to guarantee the principal and interest on such bonds as might be issued by the Terminal Company.* (R., Vol. II, pp. 501-502.)

The Terminal Company on June 21, 1898, entered into a contract with the city of Nashville, under and by which the terminal facilities were constructed by and with the consent of the city. Certain streets were closed and others were opened, and viaducts were provided for. It was understood at the time such facilities were being constructed that they would be used under the lease above mentioned by the Louisville Company and the Nashville Company, and these companies guaranteed to the city of Nashville *that all the obligations undertaken by the Terminal Company in said contract would be performed.* (R., Vol. II, p. 577.)

Under the above contracts, the Terminal Company constructed the union passenger station, freight depots, switch yards, and various other terminal facilities, all of which had been leased, as has been hereinbefore mentioned, to the two railroad companies under a contract hereinbefore mentioned, to the two railroad companies under a contract dated June 15, 1896. The improvements cost a large sum of money and were completed in 1900.

5. History of the Switching Arrangements Between the Louisville Company and the Nashville Company.

Prior to the construction of these terminal facilities, there was a reciprocal arrangement for switching between the Louis-

ville Company and the Nashville Company. A car coming in over the Nashville road destined to an industry located upon the Louisville Company's tracks was delivered to the Louisville Company at a certain point in the city, and from there switched by said company to the industry to which it was consigned. Cars coming in over the Louisville Company's tracks, destined to an industry on the tracks of the Nashville Company, were delivered at certain points to the Nashville Company, and by it transported with its own engines and crews to the industry on its line.

The same course of interchange of switching was followed between these two companies as to carloads originating in Nashville and destined to other points.

There was a uniform charge of two dollars per car. On competitive traffic, this two dollars switching charge was absorbed by the road having the transportation haul. *On non-competitive traffic the switching charge was paid by the shipper or consignee.* (R., Vol. II, p. 575.)

This system of interchange of switching was an expensive one. There were no common terminal yards at which such interchange could be made. Each company was compelled to maintain its own switch engines and crews, and each had to maintain its own interchange tracks, separate and distinct from the other. This method of handling the business was so unsatisfactory that after the construction of the terminal facilities by the Terminal Company the two roads undertook to economize and bring about a more perfect system of handling freight at Nashville, and this resulted in the operating agreement known in the record as the "Nashville Terminals".

6. Nashville Terminals.

On August 15, 1900, the two railroad companies entered into

an agreement creating an organization known as the Nashville Terminals, for the operation, maintenance and conduct of the business of the terminals at Nashville. The agreement embraces all the property, improvements, buildings, erections and superstructures leased by the two companies from the Terminal Company. The Louisville Company contributed and set apart to the Nashville Terminals organization certain of its property described in said agreement, and the Nashville Company did likewise. It was to be managed by a Board of Control, consisting of three members, to-wit: the Superintendent of the Nashville Terminals, and the General Managers, respectively, of the railroads. It provides in detail as to maintenance and operation, and the expenses of the organization were to be divided between the two roads upon a wheelage basis. (R., Vol. II, p. 575.)

Articles V and VI of this agreement, found in Vol. II, page 382, provide that whatever expenses may be legitimately incurred in the maintenance and operation of the Nashville Terminals shall be apportioned between "passenger," "house and private sidings" and "train yards."

Article V shows what should be charged to the "passenger" account, and what shall be charged to the "house and private sidings" account. Then it is provided that all other expenses of maintenance and operation shall be charged to the "train yards" account.

Article VI sets forth how this expense is to be apportioned between the two roads. The total expense for maintenance and operation charged to "passenger" account is apportioned between the two roads in the same proportion that the total number of passenger, express, baggage and mail cars, private cars and sleepers, and passenger locomotives handled for each bears to the whole number handled for both.

The expense for maintenance and operation charged to "house and private sidings" is to be apportioned between the roads in the same proportion as the total number of cars placed or withdrawn from house and private sidings, bulk or team tracks for each of the roads bear to the whole number of cars placed or withdrawn for both.

The total expense for maintenance and operation charged to "train yards" is to be apportioned between the parties in the same proportion that the number of cars of all kinds and locomotives hauling trains received and forwarded for each of the parties bear to the whole number of cars of all kinds and locomotives hauling trains received and forwarded.

In other words, it will be observed that the total expense of maintenance and operation is to be apportioned between the two roads *according to the use which each road makes of the Nashville Terminals.*

7. The Method of Operation in the Nashville Terminals.

The trains of both railroads come into the central train yards. There they are broken up, and cars destined to various industries at Nashville are carried to certain assembling districts, and thence switched to their proper places.

As to outgoing business, cars are brought into these central train yards and the trains are made up and then leave for their destinations.

All of this work in breaking up and making up trains and distributing cars is performed through the service of the joint agent, the Nashville Terminals. There is no delivery made by one road to the other. (R., Vol. II, pp. 386-391.)

There is no switching charge paid by either road, or by either the shipper or the consignee.

Each of these two roads reaches the industries located upon these tracks within the territory of the Nashville Terminals. As stated above, each road at the end of the month pays for the service of moving its own cars. This is arrived at by requiring each road to pay the joint expenses in proportion to the number of cars handled.

8. The Tennessee Central Railroad Company.

At the time this arrangement of the Nashville Terminals was entered into *there was no other railroad in the city of Nashville than the Louisville Company and the Nashville Company.*

The Tennessee Central Railroad Company constructed a road into Nashville in 1901-2.

There was no interchange of traffic between the new road and the two old roads prior to 1907. During the year 1907 the Louisville Company and the Nashville Company began to interchange with the Central Company non-competitive traffic, except coal traffic, at a uniform charge of three dollars per car.

The Central Company connects with the line of the Nashville Company at Shops Junction, *about two miles west of the train yards belonging to the Louisville Company and the Nashville Company*, as already indicated. The Tennessee Central *connects with the Louisville Company at Vine Hill on the main line, several miles south of these yards. It has no connection whatsoever* with the *train yards* or *central terminal property* of the two old roads. (R., Vol. II, p. 572.)

9. Complaint Filed with the Interstate Commerce Commission.

On January 17, 1914, the city of Nashville and the Traffic Bureau of that city filed a complaint with the Interstate Commerce Commission, whereby they sought to have that Commission to require the Louisville Company and the Nashville Com-

pany to switch cars of competitive traffic between the industries on their respective tracks and points of connection with the Tennessee Central Railroad Company, and to require the Tennessee Central to perform the same service for the Louisville Company and the Nashville Company.

The case was finally submitted October 22, 1914, and on February 1, 1915, the Interstate Commerce Commission rendered its opinion and made an order in the case.

10. Report of the Interstate Commerce Commission.

The Interstate Commerce Commission in its report stated substantially the facts that have already been set forth herein. Its conclusions are indicated from the following extracts:

> "*Defendants unquestionably interchange traffic with each other and without distinction between competitive and non-competitive traffic.* The cars of both roads are moved over the individually owned terminal tracks of the other to and from industries on the other, and both lines are rendered equally available to industries located exclusively on one. The movement, it is true, *it not performed immediately by the road over whose terminal tracks it is performed, but neither is it performed immediately by the road whose cars are moved.* It is performed by a joint agent for both roads, and that being so, we are of the opinion *that the arrangement is essentially the same as a reciprocal switching arrangement,* and accordingly constitutes a facility for the interchange of traffic between, and for receiving, forwarding, and delivering property to and from defendants' respective lines, within the meaning of the second paragraph of section 3 of the act. The joint maintenance and operation of the tracks utilized in a sense constitutes the terminal tracks of each road the tracks of the other, but inasmuch as both roads contribute nearly the same track mileage and defray the joint expenses in pro-

portion to the number of cars handled for each, the arrangement cannot differ materially in ultimate consequence from an arrangement whereby each road performs all switching over its own tracks and interswitches traffic with the other. The Louisville & Nashville contributes 8.10 miles of main and 23.80 miles of side tracks; the Nashville, Chattanooga & St. Louis, 12.15 miles of main, and 26.37 miles of side tracks. *We cannot agree with defendants' contention that they have merely exchanged trackage rights. But even if they have, we think the term 'facility,' as used in section 3 of the act, also includes reciprocal trackage rights over terminal tracks, the consequences and advantages to shippers being identical with those accruing from reciprocal switching arrangements"* (Italics ours.) (Vol. 1, pp. 56-57.)

"Since defendants interchange traffic with each other, they cannot refuse to interchange traffic upon substantially the same terms with the Tennessee Central, provided the circumstances and conditions are substantially the same, and defendants are not required 'to give the use of their tracks or terminal facilities' to the Tennessee Central within the meaning of the concluding proviso of section 3."

"The only use of defendants' 'tracks or terminal facilities' asked by complainants for the Tennessee Central is the use incidental to the movement of Tennessee Central cars by defendants to and from industries on defendants' tracks. *No use by Tennessee Central trains is asked nor any use of defendants' freight depots or team or storage tracks. In the latter case defendants' tracks would be used for transportation conducted by the Tennessee Central. In the case of the use actually asked defendants will conduct the transportation, and the difference is more than a mere difference in degree.*

"Most of the industries involved are situated from 2 to 7 miles from Shops Junction. The service asked is a railroad haul, and in our opinion constitutes transportation.

as defendants tacitly concede when they argue that the local rates to and from Shops Junction and Vine Hill at which they had moved Tennessee Central competitive traffic are transportation rates for transportation to and from local points. Section 1 of the act requires railroads subject to the act to furnish transportation, including the transportation of cars of connecting carriers. Since adequate provision is made for the return of cars interchanged and for compensation for their use, and the use of tracks incidental to transportation conducted entirely by the carrier whose tracks are used is the very use which railroads are constituted to afford, no property is 'taken' by these provisions. *G. T. Ry. Co.* v. *Michigan Ry. Comm.*, 231 U. S., 457; *C. M. & St. P. Ry. Co.* v. *Iowa*, 233 U S., 334; *C., I. & L. Ry. Co.* v. *Railroad Commission*, 95 N. E., 364; *Pa. Co.* v. *U. S.*, 214 Fed., 445; *St. L., S. & P. R. R. Co.* v. *P. & P. U. Ry. Co., supra.*" (Italics ours).

(R., Vol. II, pp. 580-587.)

11. The Order of the Interstate Commerce Commission.

The order of the Commission is as follows:

"It is ordered, That defendant Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company be, and they are hereby notified and required to cease and desist, on or before May 1, 1915, and thereafter to abstain from maintaining a practice whereby they refuse to switch interstate competitive traffic to and from the tracks of the Tennessee Central Railroad Company at Nashville, Tennessee, on the same terms as interstate non-competitive traffic, *while interchanging both kinds of said traffic on the same terms with each other, as said practice is found by the Commission in its said report to be unjustly discriminatory.*

"It is further ordered, That said defendants Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company be, and they are hereby, notified and required to establish, on or before May 1, 1915, upon notice to the Interstate Commerce Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and thereafter to *maintain and apply to the switching of interstate traffic to and from the tracks of the Tennessee Central Railroad Company at said Nashville, rates and charges which shall not be different than they contemporaneously maintain with respect to similar shipments to and from their respective tracks in said city, as said relation is found by the Commission in its said report to be non-discriminatory.*" (Italics ours.)

(R., Vol. II, pp. 589-590.)

12. Proceedings in the District Court.

Appellants filed their petition in the District Court of the United States for the Middle District of Tennessee assailing the order as being unwarranted under the facts, and made appropriate application for an injunction. Without detailing the various proceedings in the District Court, it is sufficient to state that the application for injunction was denied and the petition was dismissed. (R., Vol. I, p. 81.) An appeal was prayed and allowed.

V.

ARGUMENT.

The case seems to be this: The Louisville Company and Nashville Company have jointly acquired at Nashville, at an

enormous cost, a central terminal yard with which the lines of both companies have direct and immediate connection. These two companies conceived the idea of annexing to this jointly owned central yard the tracks of each within a prescribed district, and to operate through a joint agent the entire terminal thus created. The expense of maintenance and operation is divided between the companies according to the *use made by each of the terminals.* This arrangement was in operation when a third railroad, the Tennessee Central Company, was constructed into Nashville, which railroad tapped the Nashville Company's track within the prescribed terminal district. The Louisville Company and Nashville Company refused to switch cars of competitive traffic to and from this connection and to and from industries located within their terminal district. The Interstate Commerce Commission upon complaint has held that by this arrangement each of these companies have thrown open its own terminals to the other, and so long as the arrangement was continued each must switch for the Tennessee Central.

The contention of these appellants is that they are not interchanging traffic with each other, but that each is handling its own traffic and delivering it to each industry within the terminal district through a joint agent to be sure, but at its own expense; that neither has switching charges against the other; that no switching charge has been filed with the Interstate Commerce Commission; and that the plan of operation does not bear the slightest relationship to a reciprocal switching arrangement, in which case one road performs a service for another at its own expense, on its own track, through its own switching crew for a switching charge which is either paid by the shipper or consignee or by the carrier for which the switching is done.

A.—*The Courts are Authorized to Review a Conclusion of the Interstate Commerce Commission when "There is No Substantial Evidence Supporting Such Conclusion, or Such Conclusion is Contrary to the Undisputable Character of the Evidence."*

The above proposition is so well sustained by the decisions of this Court that it is only necessary to call attention to the language of Mr. Chief Justice White, in the opinion in the case of *Florida Line* v. *United States,* 234 U. S., 167, 185, as follows:

> "While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding and may not be re-examined in the Courts, it is undoubted that where it is contended that an order whose enforcement is resisted *was rendered without any evidence whatever to support it,* the consideration of such a question involves not an issue of fact, but one of law which it is the duty of the Courts to examine and decide. (*Int. Com. Comm.* v. *Louis. & Nash. R. R. Co.,* 227 U. S., 88, 91, 92, and cases cited.)" (Italics ours.)

See also:

Interstate Commerce Commission v. *Union Pacific Railroad Co.,* 222 U. S., 541, 547, 548.

Interstate Commerce Commission v. *Louisville & Nashville Railroad Co.,* 227 U. S., 88, 91, 92, 100.

Louisville & Nashville Railroad Co. v. *United States,* 216 Fed., 672, 679.

Pennsylvania Co. v. *United States,* 236 U. S., 361.

B.—*There is No Substantial Evidence to Support the Conclusion that the Plan of Operation of the Louisville Company and Nashville Company at Nashville is Essentially the Same as a Reciprocal Switching Arrangement Between Them.*

The Interstate Commerce Commission in its opinion emphasized the proposition that the two railroad companies were in-

terchanging traffic with each other. The Commission says: "The movement, it is true, is not performed immediately by the road over whose terminal tracks it is performed, but neither is it performed immediately by the road whose cars are moved. It is performed by a joint agent for both roads, and that being so, we are of opinion that the arrangement is essentially the same as a reciprocal switching arrangement, etc." (R., Vol. II, p. 580.) Again the Commission says: "Since defendants interchange traffic with each other, they cannot refuse to interchange traffic upon substantially the same terms with the Tennessee Central, provided the circumstances and conditions are substantially the same and defendants are not required to give the use of their tracks for terminal facilities within the meaning of the concluding proviso of section 3." (R., Vol. II,, p. 581.)

The same idea is emphasized in the opinion of the District Court. That Court says:

> "The operation jointly carried on by the Louisville & Nashville and the Nashville & Chattanooga under the Terminals agreement is not a mere exchange of trackage rights to and from industries on their respective lines at Nashville, under which each does all of its own switching at Nashville and neither switches for the other. It is, on the contrary, in substance and effect, an arrangement under which the entire switching service for each railroad over the joint and separately owned tracks is performed jointly by both, operating as principals through the Terminals as their joint agent; each railroad, as one of such joint principals, hence performing through such agency switching service for both itself and the other railroad."
>
> (R., Vol. I, pp. 69-70.)

Again it is said:

> "And, viewed in its fundamental aspect, and considered with reference to its ultimate effect, we entirely con-

> cur in the conclusion of the Commission that such joint switching operation 'is essentially the same as a reciprocal switching arrangement,' constituting a facility for the interchange of traffic between the lines of the two railroads, within the meaning of the second paragraph of section 3 of the Interstate Commerce Act."
>
> (R., Vol. I, p. 70.)

The contention of the appellants is that the method of operation does not bear the slightest resemblance to a reciprocal switching arrangement. Appellants say that in substance each road moves its own cars with its own engines and crews, and at its own expense. While it is not strictly true that each road handles its own cars with its own engines and crews, but by joint agent, yet the purpose of the arrangement is that the railroad whose cars are being moved shall assume all of the expense and risk of moving them. The joint agent while moving the cars of one railroad is the agent of that railroad.

The term "reciprocal switching" is in general use in the United States, and has a definite and precise significance.

Under such a reciprocal switching arrangement the carrier performing the *transportation haul* does *not perform* the switching service.

The carrier enjoying the transportation haul delivers at the point of destination the car to the "switching" carrier, and the latter receives, handles and delivers it to the industry located upon its track. It thus has possession of the car, moves it with its own engine and crew, is responsible for it while in its possession, and bears the entire burden, cost and responsibility of the switching service.

On the other hand, the carrier performing the switching service as to outbound freight, takes the car from the point where it is loaded upon its track, moves it with its own engine and crew

and delivers it to the carrier which is to perform the transportation haul.

The entire expense of this switching is borne, not by the carrier having the *transportation haul*, but by the carrier *performing the switching service*.

The charge which is made by the switching carrier is ordinarily a uniform amount per car, and not necessarily proportionate at all to the expense which the switching carrier incurs in the performance of the service.

When two carriers thus switch for each other at any particular point, there is a "*reciprocal switching arrangement*." The real consideration for such an arrangement is not the uniform charge per car; but grows out of the fact that each performs for the other a similar service approximately the same in extent.

The switching charge which, as stated above, is, as a usual thing, a uniform charge per car, is not intended to be proportionate to the expense incurred. One car may be switched three hundred yards, another one three miles. The charge per car, however, is usually the same in each instance.

The Interstate Commerce Commission, in describing a situation of reciprocal switching at Chicago, in the case of *Hammerschmidt & Franzen* v. *Chicago & Northwestern Railroad Co.*, 30 I. C., 73, says:

> "The scheme is based upon a schedule of reciprocal charges under which the terminal carriers switch for one another at substantially uniform rates or charges, which are fixed regardless of the expense or cost of the service performed."

The plan of operation at the Nashville Terminals does not bear the slightest resemblance to a reciprocal switching arrangement.

If the Louisville Company brings a car into Nashville destined to an industry upon the tracks of the Nashville Company, it *does not deliver such car to the Nashville Company;* the Nashville Company *does not pay* the expense of switching the car to the industry upon its track; the Louisville Company *does not pay* the Nashville Company any *switching charge for such movement;* such car is moved by the Nashville Terminals, a joint agent, at the expense of the Louisville Company; the Louisville Company, in fact and in law, has *possession of the car until delivered;* the Nashville Company in fact and law has *no possession* of the car, and is under no obligation with respect to such car; the Nashville Company never becomes the *carrier of such car.*

As nearly as any system of bookkeeping can determine, the Louisville Company pays the actual expense of moving this car to the industry upon the tracks of the Nashville Company, including the wages of the crew, the coal consumed in the engine, the wear and tear of the track, and the hire of the engine.

The same state of facts exists as to a car loaded at an industry upon the tracks of the Nashville Company and to be transported by the Louisville Company. The Nashville Company does not *take possession of this car;* it does not move it *with its engine;* it does not *pay the expense* of moving it; but, on the other hand, the Louisville Company takes charge of the car, puts it in its train, and pays the expense thereof as nearly as the same can be estimated.

W. P. Bruce is the Superintendent of the Nashville Terminals. He testified as follows:

> "Is it or not true that in the operation of the Nashville Terminals the Louisville & Nashville Railroad Company switches for the Nashville, Chattanooga & St. Louis Rail-

way or the Nashville, Chattanooga & St. Louis Railway switches for the Louisville & Nashville Railroad?

"No. The Nashville Terminals switches for both as the direct agent of each.

"My question was whether either switches for the other?

"They do not."

(Vol. II, p. 387.)

Again he testifies:

"Q. How is the expense of the service divided as between the two roads?

"A. It is divided on the basis of the number of cars handled for each."

(Vol. II, p. 387.)

It is submitted therefore that this case cannot be governed by the principles announced in the case of *Pennsylvania Co.* v. *United States*, 236 U. S., 351, because in that case the Pennsylvania Company actually received the cars of one carrier and switched them to the industries located upon the Pennsylvania's tracks at a certain switching charge, which was on file with the Interstate Commerce Commission, and declined to perform the same service for another carrier having a connection with the Pennsylvania road at the identical point where the former carrier had a connection.

C.—*The Arrangement is Essentially the Same as if Both Roads had Acquired and were Operating Jointly the Entire Terminal, or the Same as Each Having Exchanged Trackage Rights with the Other.*

In elaborating the above principle let us suppose that not only the central terminal yard belongs to these two roads jointly, but that all the tracks that were put into the Nashville Terminals agreement were owned jointly by the two roads, and let us suppose further that each of the two roads used its own crews and

engines in delivering cars to industries located upon these jointly owned tracks. Manifestly, such an arrangement could not be said to be a "reciprocal switching arrangement," nor could it be said that either road had opened its terminals to the other road. The two roads under such circumstances could decline to switch for the Tennessee Central, because neither road is switching for the other, and the switching is not being done by a joint agent.

Let us suppose now that the two roads, instead of having a separate crew and engines should, for the purpose of economy, employ a joint agent to deliver the cars of both roads to the industries to which they were destined. It would seem that there is nothing in the Act to Regulate Commerce to prohibit a co-operation of this character, for the purpose of economy. The two roads would under such circumstances divide the expense of operation precisely as it is under the plan appearing in this record. Could it be said that if the two roads did own jointly the entire terminal district and employ a joint agent to perform the switching for each that it must also on demand furnish such service to the Tennessee Central? This Court, in the case of *United States* v. *St. Louis Terminal,* 224 U. S., 405, said:

> "It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals."

It is understood, of course, that the above language does not reach the question now under discussion, because the order of the Interstate Commerce Commission does not in terms require that these appellants should permit the Tennessee Central, with

its own engines and crews, to enter upon their tracks. It would seem clear, however, that if the two roads owned jointly these tracks, they could not be guilty of unjust discrimination against the Tennessee Central, because they declined to switch the cars of the Tennessee Central over such tracks. The arrangement appearing in this record is substantially the same as if the two roads owned jointly all the tracks in the terminal district and operated the same by a joint agent.

But it is said in response that only the central terminal yard is jointly owned, and that the other tracks in the terminal district belong separately to the two roads. But in reply to this it may be said that each road has thrown its separately owned tracks into a common use so that each road may go upon the tracks of the other for the purpose of making deliveries.

In further elaboration of the above idea, let us return to the period before the organization of the Nashville Terminals.

At that time there was a reciprocal switching arrangement. Suppose now that the Nashville Company should enter into negotiations with the Louisville Company and secure by contract the right to enter upon the latter's tracks with its own switching crew and engine and deliver cars which the Nashville Company had brought to the city of Nashville to be delivered to the industries located upon the Louisville Company's tracks. It pays the Louisville Company an annual rental for such privilege or trackage rights.

After having secured such a right, the Nashville road transports a car to Nashville destined to an industry located upon the tracks of the Louisville Company. Instead of delivering this car to the latter company to be switched by it to such industry, it takes its own engine and crew and, by virtue of its rights under the contract, passes over the tracks of the Louisville Company and delivers the car to the industry located

upon such tracks. It has paid to the Louisville Company the rental for the trackage rights. It has also paid the entire cost incident to the service. There has been no switching charge paid by the Nashville Company to the Louisville Company.

Suppose we now go one step further, and that the Louisville Company in turn secures from the Nashville Company a similar right to enter upon the latter's tracks with its own switch engines and crews for the purpose of making deliveries to industries located upon such tracks. It then performs such switching service at its expense, and there is no switching charge.

If this system of deliveries were in effect at this time, no one would scarcely contend that there was any reciprocal switching arrangement in the sense that such term is used, but that each of these roads had trackage rights over the other and made its own deliveries.

Suppose now that instead of each paying to the other an annual rental, that it be ascertained that each has about the same number of tracks, the same mileage of tracks, and handles approximately the same number of cars during the year. They enter into a new arrangement by which the rental is eliminated, and each in consideration of the trackage rights it gets from the other extends to the other trackage rights over its own tracks.

We would then have a system where there is no reciprocal switching arrangement, for each road handles its own cars to and from the industries located on the other with its own crews and with its own engines, and neither pays to the other a switching charge.

One step further: As each of these roads brings its trains into the same central train yard, it appears to both that it would be a matter of economy to handle the business of each through a joint agent instead of through separate agents. Such a plan would simplify the matter of rules and regulations and of opera-

tion. It would tend to economy. Each would perform this service which it had been performing with its own switching crews and engines in a more satisfactory and economical way through the joint agent.

Has the substance of the plan changed by the employment of the joint agent?

We say not. The substance is still there. The only change that has intervened is one of more economical and satisfactory service. This more satisfactory and economical service has been attained through the employment of the joint agent, which not only operates but maintains all the switch tracks or terminals.

The expense incurred by this joint agent is divided between the two roads according to the use which each makes of the tracks and the switch engines and crews.

We respectfully submit that this is not a reciprocal switching arrangement. Each handles its own freight. Each pays for the handling of its own freight. There is no switching charge paid by either to the other. There is no switching charge imposed upon the shipper or the consignee. There are no switching charges filed with the Interstate Commerce Commission.

It is submitted that the plan of operation at Nashville, as it appears in this record, is not essentially different from what would be the plan of operation if all the tracks embraced in the Nashville Terminals were jointly owned by the two roads. If they were so owned, each would have the right to pass over all the tracks embraced in the Nashville Terminals, with its own engines and crews, and deliver cars to the industries located on such tracks. The fact that under such circumstances a joint agent to perform all of such service should be employed would not in any wise tend to open the terminals to either of the railroads in question, because each of them owns the terminals and has the right to transport its cars thereon.

Nor is the plan appearing in this record essentially different from a plan where each of the two roads has granted to the other trackage rights over its separately owned tracks for the purpose of making deliveries. If such trackage rights had been exchanged, and the crews and engines of each under such contract had passed over the tracks of the other, it could not be said that there was any reciprocal switching arrangement or interchange of traffic between them. If, for economical purposes, these two roads choose to select a joint agent to perform these services, it could not follow that by the selection of such joint agent that the plan had developed into a reciprocal switching arrangement.

Economical operation through joint service should not be made the basis of holding that the plan constitutes a reciprocal switching arrangement, or should not be made the basis of a condition that one road is interchanging traffic with the other.

Let us now consider contracts of the nature of the one under consideration, in connection with section 3 of the Act to Regulate Commerce.

The leading case on this subject is that of *Kentucky & Indiana Bridge Co.* v. *Louisville & Nashville Railroad Co.*, 37 Fed., 567, the opinion being delivered by Judge Jackson, afterwards Mr. Justice Jackson of the Supreme Court. In speaking of this limitation upon the Commission in section 3 of the Act to Regulate Commerce, he says:

> "Now, under this last limitation upon, or qualification of, the duty of affording all reasonable, proper, and equal facilities for the interchange, or for the receiving, forwarding, and delivering of traffic to and from and between connecting lines, it is clearly left open to any common carrier to contract or enter into arrangements for the use of its tracks and terminal facilities with one or more connecting lines, without subjecting itself to the charge of giving an

undue or unreasonable preference or advantage to such lines, or of discriminating against other carriers who are not parties to, or included in, such arrangements. No common carrier can therefore justly complain of another that it is not allowed the use of that other's tracks and terminal facilities, upon the same or like terms and conditions which, under private contract or agreement, are conceded to other lines." (P. 628.)

In the case of *Oregon Short Line Railroad* v. *Northern Pacific Railroad Co.*, 51 Fed., 465, Mr. Justice Fields referred to the above case with approval in the following language:

"The provision in the second subdivision of the third section of the interstate commerce act, that a common carrier shall not be required to give the use of its tracks and terminal facilities to another carrier engaged in like business, is a limitation upon or qualification of the duty declared of affording all reasonable, proper, and equal facilities for the interchange of traffic and the receiving, forwarding, and delivering of passengers and property to and from the several lines and those connecting therewith. It was so expressly held in the case above cited of *Kentucky & I. Bridge Co.* v. *Louisville & Nashville R. R. Co.*, 37 Fed. Rep., 571."

Proceeding, the learned Judge said:

"It follows from this, as it was decided in that case, that a common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities with one or more connecting lines, without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests. The act does not purport to divest the railway carrier of its

exclusive right to control its own affairs, except in the specific particulars indicated." (Pp. 474-5.)

Again in the case of *Little Rock, Etc., Railroad Co.* v. *St. Louis, Iron Mountain & Southern Ry. Co.*, 59 Fed., 400, the Court referred to both of the above cases, and stated that it followed from them that "no common carrier can justly complain of another because it is not allowed the use of the tracks and terminal facilities of such other railway company in the same manner and to the same extent another is." (P. 404.)

Again, in the case of *Little Rock, Etc., Railroad Co.* v. *St. Louis Southwestern Ry. Co.*, 63 Fed., 775, decided by the Circuit Court of Appeals, Eighth Circuit, the opinion being delivered by Circuit Judge Thayer, the Court said:

> "The inhibitions of the third section of the law, against giving preferences or advantages, are aimed at those which are 'undue or unreasonable,' and even that clause which requires carriers 'to afford all reasonable, proper, and equal facilities for the interchange of traffic' does not require that such 'equal facilities' shall be afforded under dissimilar circumstances and conditions. Moreover, the direction 'to afford equal facilities for an interchange of traffic' is controlled and limited by the proviso that this clause 'shall not be construed as requiring a carrier to give the use of its tracks or terminal facilities to another carrier.' *Kentucky & I. Bridge Co.* v. *Louisville & N. R. R. Co.*, 37 Fed., 571; *Oregon Short Line & U. N. Co.* v. *Northern Pac. R. R. Co.*, 51 Fed., 465, 473." (P. 778.)

It has been suggested that amendments to the Act to Regulate Commerce have made these decisions no longer controlling as to the interpretation of the proviso in section 3.

The amendment specifically referred to is that one to the 15th section of the Act, authorizing the Commission to estab-

lish through routes and fix joint rates, and make divisions thereof between connecting carriers. The effect of this amendment is within such limits that it does not in any way involve any unjust discrimination as to trackage rights. The authority of the Commission to establish through routes between carriers does not give it any power to require the physical use of the property of one railroad to be turned over to another.

Prior to the amendment as to through routes, both the Commission and the courts have denied relief under certain conditions, which would now under the amendments be granted. Thus, where a carrier made a through routing or traffic agreement with one line it was not unjust discrimination to decline a similar arrangement with a third line. One of the reasons that has been given for the denial of such relief, is that the Act had not authorized the Commission or the courts to establish through routes or to prescribe through rates. Such authority has now been given the Commission, and therefore, the proviso of section 3 is now modified to the extent that it does not prohibit the Commission from concluding that there is unjust discrimination in such case, and from entering an order removing the discrimination.

It seems, however, to be well understood that the amendment to the Interstate Commerce Act does not prevent a railroad company from giving trackage rights to one road and denying it to another. Thus, in the recent case of the *Pennsylvania Co.* v. *United States*, 236 U. S., 279, this Court, speaking through Mr. Justice Day, says:

> "In the present case we think there is no requirement in the order of the Commission amounting to a compulsory taking of the use of the terminals of the Pennsylvania Company by another road, within the inhibition of this clause of section 3. The order gives the Rochester road

no right to run its cars over the terminals of the Pennsylvania Company or to use or occupy its stations or depots for purposes of its own. There is no requirement that the Rochester Company be permitted to store its cars in the yards of the Pennsylvania Company or to make use of its freight houses or other facilities; but simply that the Pennsylvania Company receive and transport the cars of the Rochester Company over its terminals at New Castle in the same manner and with the same facilities that it affords to other railroads connecting with the Pennsylvania Railroad at the same point." (P. 368.)

Again, the Supreme Court says:

"So in the present case, all that the order requires the Pennsylvania Company to do is to receive and transport over its terminals by its own motive power, for the Rochester Company, as it does for other companies, similarly situated, carload freight in the course of interstate transportation." (P. 369.)

The concluding statement of the opinion was:

"So here there is no attempt to appropriate the terminals of the Pennsylvania Railroad to the use of the Rochester Company. What is here accomplished is only that the same transportation facilities which are afforded to the shipments brought to the point of connection over tracks used in common by the Baltimore & Ohio Railroad and the Rochester Company, shall be rendered to the Rochester Company as are given to the Baltimore & Ohio Company under precisely the same circumstances of connection for the transportation of interstate traffic. All that the Commission ordered was that the company desist from the discriminatory practice here involved, and in so doing we think it exceeded neither its statutory authority nor any constitutional limitation, and that the District Court was right in so determining." (P. 371.)

It will also be noted in the dissenting opinion of Mr. Chief Justice White, it is said:

> "The Court now holds that this controversy involves merely a switching privilege and the duty of one railroad not to refuse such privilege to another, or at all events if it permits it to one, to allow it to other roads on terms of equality. By a necessary inference, therefore, the decision now made is concerned alone with that subject and does not in any degree whatever as a matter of law involve the right of one railroad company to compel another to permit it to share in its terminal facilities." (P. 372.)

The above authorities are collated and referred to in order to establish the proposition that if the arrangement at Nashville is a legal one, not prohibited by any of the provisions of the Act to Regulate Commerce, then there is no unjust discrimination in the sense of section 3 of the Act. Both the Commission and the courts being powerless to compel a third party to participate in the arrangement or to compel those participating to admit a third party to the arrangement on the same terms, there can be no basis under the Act to Regulate Commerce for the conclusion that there is unjust discrimination, and the Commission is not warranted in issuing an order requiring these companies to cease this legal practice.

If the position taken be correct, that is, that the plan of operation at Nashville does not constitute a reciprocal switching arrangement or does not bring about an interchange of traffic between the two roads, but is essentially the same as if both companies owned the entire terminal district, or is essentially the same as if the companies had exchanged trackage rights with each other, then the above cases support the proposition that the plan is legal and in no way contrary to the provisions of the Act to Regulate Commerce. One railroad company, as has been

seen, can extend rights to another railroad company to operate over its tracks, and yet exclude other companies from operating over the same tracks. There is no authority to compel a railroad extending such trackage rights to one road to extend trackage rights to another. This brings us to a consideration of the question as to how the order of the Interstate Commerce Commission can be complied with, without permitting the Tennessee Central Railroad to participate in the arrangement of the Nashville Terminals.

D.—*How Can Appellants Comply with the Order of the Interstate Commerce Commission?*

The order of the Interstate Commerce Commission requires the appellants to abstain from maintaining a practice whereby they refuse to switch interstate competitive traffic to and from the tracks of the Tennessee Central Railroad Company at Nashville upon the same terms as interstate non-competitive traffic, while interchanging both kinds of traffic on the same terms with each other. This portion of the order could be readily complied with by declining to switch non-competitive traffic, except for the fact that the Commission orders that both competitive and non-competitive traffic must be switched for the Tennessee Central Railroad Company so long as the two roads interchange both kinds of traffic with each other. If we are correct in the proposition that appellants are not interchanging traffic with each other, of course this order falls to the ground as being illegal and void.

But the real difficulty in complying with the order of the Commission is as to that part of the order providing that appellants shall file and post, as prescribed by section 6 of the Act to Regulate Commerce and to maintain and apply to the switching of

interstate traffic to and from the tracks of the Tennessee Central Railroad Company at Nashville, "rates and charges which shall not be different than they contemporaneously maintain with respect to similar shipments to and from their respective tracks in said city, as said relation is found by the Commission in its said report to be non-discriminatory."

Compliance with this order of the Commission involves one or another of the following schemes:

(a) To switch for the Tennessee Central at the same cost per car as that which it contemporaneously costs each of the two companies per car for switching its own cars in the Nashville terminals, or

(b) To permit or compel the Tennessee Central to enter into the common or joint arrangement; or

(c) To set up between the two companies a fictitious or paper switching charge, and then charge the Tennessee Central the same per car; or

(d) To destroy the organization known as the Nashville Terminals, so that each will only use its own tracks, and each will maintain and operate separate switching crews and engines, and both will establish interchange tracks and a uniform switching charge; and then impose such uniform switching charge upon the Tennessee Central for services that each performs for it.

It is believed that the invalidity of the order will appear from the impossibility of complying with it without destroying the arrangement between the two companies at Nashville.

If either of appellants be required to switch for the Tennessee Central at the same cost per car as that which it now costs each company to switch its own cars in the Nashville Terminals, it will be compelled to perform a service for the Tennessee Central certainly without any profit and probably at a loss, for it appears in the record that switching by either road for the Ten-

nessee Central will cost more per car than switching for itself. Furthermore, the cost to either of appellants to switch its own cars varies from day to day and from month to month, and it would be impossible to switch for the Tennessee Central on such a varying basis of cost.

Another method of complying with the order would be to permit or compel the Tennessee Central to enter into the common or joint arrangement. As we understand, the Tennessee Central cannot be compelled to enter into the joint arrangement for the operation at the Nashville Terminals, nor can appellants be compelled to permit the Tennessee Central to enter such an arrangement. The authorities already cited we think sustain this proposition.

Another method of complying with the order would be that the appellants might set up, as between themselves, a fictitious switching charge, that is to say, file with the Interstate Commerce Commission tariffs showing that the joint agent would charge each of the companies so much per car for switching, and then charge the Tennessee Central the same rate per car. Manifestly this would be a mere fiction, for each of appellants under the plan of operation pays the expenses of switching its own cars, and for either appellant to pay the joint agent a switching charge and then put it back in its own pocket would be an arrangement on paper and not in fact. It is submitted that a compliance with the provisions of the Act to Regulate Commerce does not contemplate a fiction of this character.

The only logical method of complying with the order of the Interstate Commerce Commission is to destroy the organization known as the Nashville Terminals, so each of appellants will only use its own tracks; each will maintain and operate separate switching crews and engines; each then could decline to switch for the other, and thereby comply with the order of the Com-

mission, or each could switch for the other and also switch for the Tennessee Central on the same basis. If, however, the arrangement between appellants at Nashville is a legal one, no order of the Interstate Commerce Commission, a compliance with which requires this arrangement to cease, can be valid or lawful.

E.—*The Circumstances Surrounding the Tennessee Central Company are Entirely Dissimilar to Those Existing Between Appellants.*

The relative location and circumstances existing between appellants' roads are entirely different from and dissimilar to, the relations of each with the Tennessee Central Company.

The Central Company *has no connection* with the central train yards. It pays no rental therefor. It has endorsed no bonds of the Terminal Company.

The Central Company connects with the Nashville Company two miles west of these central yards, and with the Louisville Company several miles south of these yards.

There is no arrangement between the Central Company and either of the other companies by which they hire jointly switch engines or employ jointly switching crews.

Let us further analyze the dissimilarity of conditions by taking the conditions between the Nashville and the Louisville Company, and the Nashville Company and the Central Company.

A car of freight comes in over the Louisville Company's line into the central yards destined to an industry upon the tracks of the Nashville Company. The Nashville Company does not take its switch engine and switch this car to its destination. The Nashville Company does not pay the expense of switching this car to its destination. On the other hand, a joint switching crew

with a joint engine carries this car to the industry located on the Nashville Company's track, and the Louisville Company at the end of the month pays for the cost of switching it.

On the other hand, a car comes in over the Central Company to be delivered upon the Nashville Company's tracks. It can only be put upon the rails of the Nashville Company two miles west of these train yards. Therefore, if the Nashville Company is compelled to deliver it to its destination, a switching crew must go to this point and get the car and transfer it to the industry located upon its own track at its own expense.

There is no method by which the Central Company can pay for the cost of performing this operation. The order of the Commission assumes that there would be a uniform charge for this service, regardless as to whether this car is destined to an industry a few hundred yards from the point of delivery or several miles from the point of delivery.

The same dissimilar conditions would exist in delivering a car from an industry located upon the Nashville Company to the Louisville Company and to the Central Company.

Such a car for the Louisville Company would be delivered by the joint crew to the central train yards and the *Louisville Company would pay for the expense of moving it.*

In the case of the Central Company the car would have to be moved two miles west of the train yards in order to reach the Central Company's tracks, and the expense of moving it *would not be paid by the Central Company,* except through a charge which would not be commensurate with the expense of the movement. The actual expense of movement must be borne by the Nashville Company, or by the joint agent.

The dissimilarity of conditions is even more striking in the case of the attempted interchange between the Louisville Company and the Central Company. The Central Company has no

connection with the Louisville Company except at Vine Hill, several miles south of Nashville, and beyond the corporate limits of the city. In order for the Louisville Company to interchange and switch cars for the Central Company from Vine Hill, it would be compelled to send a switch engine out upon the road several miles, or to pick up cars with its regular freight trains coming into Nashville. In order for the Louisville Company to deliver cars to the Central Company at Vine Hill, it would either be compelled to run a switch engine out to that point, or to carry these cars to Vine Hill in its regular freight trains and switch them out at that point.

It may be said, however, that the Louisville Company could deliver such cars to the Central Company at Shops Junction on the tracks of the Nashville Company. Still, this would make the conditions and circumstances entirely dissimilar to those existing between the Nashville Company and the Louisville Company.

Our conclusion upon this subject is that the finding of the Commission that the conditions and circumstances were substantially the same, is wholly unwarranted and unsupported by the evidence and is against the substantial character of all of the evidence. Any order based upon such an unwarranted conclusion of fact, must be necessarily illegal and void.

In conclusion it is urgently insisted that the order of the Interstate Commerce Commission is based upon a fiction, and that fiction is that appellants have at Nashville a reciprocal switching arrangement, or that appellants interchange traffic at Nashville. As has already been stated no tariff has ever been filed showing the switching charges between appellants' roads. Each pays the expense of its own switching, each does its own switching through its own agent, notwithstanding the fact that such agent is also the agent of the other. The arrangement be-

tween appellants at Nashville is essentially the same as if they owned jointly the entire terminal district at Nashville and performed the switching there through a joint agent.

Respectfully submitted,

CLAUDE WALLER,
Solicitor for Nashville, Chattanooga & St. Louis Railway.

R. WALTON MOORE,
FRANK W. GWATHMEY,
Of Counsel.